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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, etc., *Petitioner,*

vs.

JAMES A. RHODES, et al., *Respondents.*

No. 72-1318

ARTHUR KRAUSE, etc., *Petitioner,*

vs.

JAMES A. RHODES, et al., *Respondents,*

and

ELAINE B. MILLER, etc., *Petitioner,*

vs.

JAMES A. RHODES, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals, Sixth Circuit

MOTION OF THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The Mexican American Legal Defense and Educational Fund (MALDEF) requested the parties in

these cases to consent to filing the attached brief amicus curiae out of time. The petitioners in both No. 72-914 and No. 72-1318 have granted their consent. All respondents, other than respondent Rhodes, also have consented.[1]

MALDEF was established on May 1, 1968, as a non-profit corporation incorporated under the laws of the State of Texas, primarily to provide legal assistance to Mexican Americans. It is headquartered in San Francisco with additional offices in San Antonio, Los Angeles, Denver, Albuquerque, and Washington, D.C.

MALDEF, in its efforts to assist the Mexican American community achieve its rights under law, has been involved in litigation which has challenged the traditional barriers with which Mexican Americans are faced: abridgement of participatory constitutional and political rights, unequal educational opportunities, discriminatory employment practices, unequal distribution of public services, and police malpractice.

Courts have recognized that Mexican Americans constitute a separate group, often subject to distinct discrimination in today's society. E.g., *Hernandez v. Texas*, 347 U.S. 475 (1954). Quite recently a federal district court surveyed the situation as regards the Mexican Americans in Texas who were represented by MALDEF.

> Because of long standing educational, social, legal, economic, political and other widespread and

[1]The letters of consent have been filed with the Clerk.

> prevalent restrictions, customs, traditions, biases and prejudices, some of a so-called *de jure* and some of a so-called *de facto* character, the Mexican American . . . has historically suffered from, and continues to suffer from, the results and effects of invidious discrimination and treatment in the fields of education, employment, economics, health, politics, and others.

Graves v. Barnes, 343 F.Supp. 704 (Jan. 28, 1972; W.D. Texas), *rev'd in part, aff'd in part, sub nom., White v. Regester,* 93 S.Ct. 2332 (1973). See also *Keyes v. School District No. 1, Denver, Colorado,* 37 L.Ed.2d 548 (1973).

Although the issues presented in these instant cases arise out of the deployment of national guard troops on a midwestern college campus, the national guard has also been deployed against Mexican Americans. See C. McWilliams, *North From Mexico* at 197 (Greenwood Reprint Edition 1968); P. Nabokov, *Tijerina and the Courthouse Raid* at 108-112 and 129-130 (1st ed. University of New Mexico 1969). During the urban ghetto riots of the 1960's it was also deployed, with considerable resort to deadly force, against blacks. See *Report of the National Advisory Commission on Civil Disorder* at 275-279 (U.S. Government Printing Office ed. 1968). And it has been used frequently, again with considerable use of deadly force, to restore order in labor disputes. See generally, P. Taft & P. Ross, "American Labor Evidence" in H. Graham and T. Grurr, *Violence in America* (A Staff Rep. to the Nat'l Com'n on the

Causes and Prevention of Violence) (U.S. Gov't Printing Office, 1969), pp. 221-301. See also, the opinion below in the instant case in *Petition For A Writ Of Certiorari,* Appendix p. 28a (O'Sullivan J., concurring).

Mexican Americans and blacks also have been the victims of summary and abusive treatment inflicted by other state police agencies. One committee of the California Legislature recently convened hearings concerning the relations between the police and Mexican Americans.[2] Throughout the three days of hearings, this committee was presented with numerous complaints alleging the unrestrained and excessive use of force by inadequately trained law enforcement officials. Furthermore police abuse toward Mexican Americans appears not only to have existed since the latter part of the nineteenth century but also to have been widespread throughout the Southwest. See *A Report of the United States Commission on Civil Rights, Mexican Americans and the Administration of Justice in the Southwest* (1970); L. Grebler, J. Moore, and R. Guzman, *The Mexican American People* (Free Press 1970); and A. Morales, *Ando Sangrando . . . I Am Bleeding* (Perspectiva 1972). As to law enforcement malpractice addressed to blacks, see, e.g., *Report of the National Advisory Commission on Civil Disorder* at 157-170; *Justice,* 1961 U.S. Com'n on Civil Rights Report No. 5.

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[2] Hearings on *Relations Between the Police and Mexican Americans Before the California Assembly Select Committee on the Administration of Justice* (1972).

MALDEF has litigated numerous suits attacking discriminatory and illegal practices of state, county and municipal authorities affecting the lives and liberties of Mexican Americans and other minorities. With few exceptions, challenges have rested upon the irreconcilability of such practices with the spirit and intent of the Fourteenth Amendment to the Constitution and upon the affirmative remedies afforded by Congress under the Civil Rights Statutes, specifically, 42 U.S.C. §1983.

Over the years, this Court has often pointed out that federal court jurisdiction under §1983 must be given broad scope to carry out the purposes for which it was enacted. Since the decision of the Court in this litigation may affect the scope of §1983, MALDEF deems it important to bring to the Court's attention some implications of the issues here presented by respectfully praying leave to file brief *amicus curiae* out of time in support of Petitioners' briefs.

Respectfully submitted,

MARIO G. OBLEDO,
VILMA S. MARTINEZ,
SANFORD JAY ROSEN,
Mexican American Legal Defense
and Educational Fund,
145 Ninth Street,
San Francisco, California 94103,
NICHOLAS WARANOFF,
675 Sharon Park Drive,
Menlo Park, California 94025,
Attorneys for Amicus Curiae.

October, 1973.

BRIEF OF AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of the *Amicus Curiae* is set forth in the foregoing Motion.

ARGUMENT

We respectfully urge that the decision below be reversed.[3] Although this case arises out of the same tragic events as in *Gilligan v. Morgan,* 92 S.Ct. 2440 (1973), quite different legal questions are presented. This action is simply a form of damage action against police abuse. It is now settled that actions seeking damages to redress illegal arrests, searches, and excessive use of force by police are cognizable in the federal courts under §1983. See, e.g., *Monroe v. Pape,* 365 U.S. 167 (1961). Since the role of the national guard is to assist local police forces, the familiar principles of the police abuse suit should apply here.[4]

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[3]The amicus curiae agrees with the arguments already submitted by the petitioners. In this brief certain alternative arguments are presented.

[4]See Ohio Rev. Code S. 5923.22 (Supp. 1972) (emphasis added): "When there is a tumult, riot, mob or body of men acting together with intent to commit a felony, or to do or offer violence to person or property, or by force and violence break or resist the laws of the state, the commander in chief may issue a call to the commanding officer of any organization or unit of the organized militia, to order his command or part thereof, describing it to be and appear at a time and place therein specified, *to act in aid of the civil authorities . . .*"

See also then Governor Rhodes' Proclamation, printed in appendix to the opinion below, 471 F.2d at 443, reprinted in the Appendix to the Petition for Certiorari at 23 a. ("The military forces involved will act in aid of the civil authorities . . .")

It is clear that one of the foremost purposes of the Fourteenth Amendment was to secure the protection of persons against abuses such as "beatings and woundings, burning and killings . . ."[5] Moreover, the Fourteenth Amendment was a direct response to the widespread pattern of violence inflicted upon abolitionists and blacks not only before but also after the Civil War.[6]

The court below failed to apply such principles, deciding instead to insulate the entire national guard chain of command—from the Governor to the lowliest private—from liability in damages. That ruling was incorrect, and should be reversed.

I. SOVEREIGN IMMUNITY DOES NOT BAR THIS LAWSUIT

One of the principal grounds relied on below was that this action is barred by the Eleventh Amendment. Prior decisions of this Court and others have uniformly distinguished, for Eleventh Amendment purposes, between damage actions seeking recovery from state officials in their individual or private capacities, and damage actions seeking recovery from the state. In the former situation, the Eleventh Amendment is not a bar to the action. *Ford Motor Co. v. Department of Treasury,* 323 U.S. 459, 461 (1945); *Fitts v. McGhee,* 172 U.S. 516, 528 (1899); *Sostre v. McGinnis,* 442 F.2d 178, 204-05 (2d Cir. 1971) (en

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[5]J. tenBroek, *Equal Under Law* 203 (Collier ed. 1965).

[6]*The Early Antislavery Background of the Fourteenth Amendment,* 1950 Wis. L. Rev. 610, 648-661.

banc), cert. denied, 404 U.S. 1049, 405 U.S. 978 (1972); *Whitner v. Davis,* 410 F.2d 24, 30 (9th Cir. 1969); *Board of Trustees of Arkansas A & M College v. Davis,* 396 F.2d 730 (8th Cir.), cert. denied, 393 U.S. 962 (1968). Since this action seeks damages from the defendants in their individual or private capacities, and in no manner seeks any money from the state of Ohio, the Eleventh Amendment simply does not apply here.

Moreover, it is generally a requirement in an action under §1983 that the defendant be a state official. To hold, as the court below appears to have held, that this very fact bars the action under the Eleventh Amendment, even where no damages are sought from the state, would be to nullify §1983. Such a result would be especially aberrant as applied to the defendant enlisted men, commissioned officers, and general officers of the national guard, since it would create an immunity for them where none exists for the police that they are called out to assist.

II. "OFFICIAL IMMUNITY" DOES NOT BAR THIS LAWSUIT

The second principal ground relied on below was that all the defendants have an absolute "executive immunity." This holding too should be rejected.[7] At the most separate consideration must be given to this question as it applies to the different defendants.

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[7]The argument which follows is derived from Waranoff, *Federal Judicial Control of the National Guard,* 52 B.U.L. Rev. 1, 11-27 (1972).

Section 1983 speaks in the broadest terms. Read literally, it imposes liability upon "[e]very person" who commits the wrongs specified in that section; it contains no exceptions and confers no immunities upon particular classes of officials.

Despite this seemingly all-encompassing language of §1983, this Court held in *Tenney v. Brandhove,* 341 U.S. 367 (1951), that a state legislator was immune from litigation under §1983 for acts done within the sphere of legislative activity. The Court noted that legislators had enjoyed immunity from suit for centuries prior to the original enactment in 1871 of what is now §1983, and that nothing in the legislative history of §1983 manifested an intention to abolish this immunity.

Similarly, in *Pierson v. Ray,* 386 U.S. 547 (1967), this Court considered whether state judges were liable under §1983. After determining that "[f]ew doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction," 386 U.S. at 553-54, the Court could not find any indication in the legislative history of §1983 that this immunity was to be abolished. Hence, the Court concluded that Congress had not intended for §1983 to abolish judicial immunity.

Tenney and *Pierson* establish that the prerequisite to finding an immunity under §1983 is finding such an immunity existed at common law. Accordingly, to determine whether the defendants here are immune

from liability under §1983, resort should be made to the common law.

At common law, national guardsmen enjoyed no immunity from civil liability for their torts. Indeed, it was consistently held that national guardsmen have the same tort liability as police for false arrest, false imprisonment, and illegal search and seizure. *Orr v. Burleson,* 214 Ala. 257, 107 So. 825 (1926); *Franks v. Smith,* 142 Ky. 232, 134 S.W. 484 (1911); *Bishop v. Vandercook,* 228 Mich. 299, 200 N.W. 278 (1924); *Herlihy v. Donohue,* 52 Mont. 601, 161 P. 164 (1916); *Allen v. Gardner,* 182 N.C. 425, 109 S.E. 260 (1921). See also *O'Shee v. Stafford,* 122 La. 444, 47 So. 764 (1908) (state adjutant general held liable for using national guardsmen to interfere with plaintiff's business). Even army officers have been held liable in damages for illegal searches and seizures. *Bates v. Clark,* 95 U.S. 204 (1877); *Mitchell v. Harmony,* 54 U.S. (13 How.) 115 (1851).

There is no reason for applying a different rule to the "constitutional tort" committed by the unjustified use of excessive force in this case. There is, then, no basis for holding that national guardsmen are immune from liability under §1983.

Under common law there is also no body of precedent establishing a general immunity for a state governor.[8] This alone should be sufficient to refute any

[8]The special rules (see Point III of the Brief of Petitioner in *Scheuer v. Rhodes,* No. 72-914) which govern liability in defamation actions and the need for intragovernment communications, make the decisions in defamation cases against public officials a slender reed upon which to build a broad doctrine of absolute

suggestion that there was a tradition of immunity for governors, comparable to that of judges and legislators, which Congress must have meant to incorporate into §1983. Reinforcing this logic is the fact that it was the opinion of legal scholars at about the time §1983 was enacted that governors enjoyed no immunity:

> No case has been discovered in which an action for damages has been sought to be maintained against the governor for his neglect or refusal to perform . . . [a ministerial act], but if he is amenable to mandamus, no satisfactory reason is apparent why he may not be compelled to respond in damages.

F. Mechem, *A Treatise on the Law of Public Offices and Officers,* §610, at 397 (1890); see 2. F. Harper and F. James, *The Law of Torts,* 1932-33 (1956).[9]

Moyer v. Peabody, 212 U.S. 78 (1909), although relied upon below, in fact supports petitioners here. That opinion, which surely represents the high-water mark, if not flood tide, of executive immunity, only conferred a qualified privilege upon the governor, contingent on a showing of good faith.

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executive immunity. Moreover, as recognized by the Second Circuit in *Kletschka v. Driver,* 411 F.2d 436, 448 (2d Cir. 1969), cases such as *Barr v. Matteo,* 360 U.S. 564 (1959), are not dispositive . . . when the question of immunity vel non arises in an action brought under a statute, viz. the Civil Rights Act, by virtue of which Congress has already made a policy judgment in favor of imposing liability upon state officials.

[9]See also those cases in which this Court has sustained damage claims against state election officials, although neither the Eleventh Amendment nor "executive immunity" was expressly discussed. *Lane v. Wilson,* 307 U.S. 268 (1939); *Nixon v. Herndon,* 273 U.S. 536 (1927); *Myers v. Anderson,* 238 U.S. 368 (1915).

CONCLUSION

Thorough analysis of the legal principles involved in this case reveals that the courts below rendered erroneous decisions and that Judge Celebrezze who dissented was correct. The judgment below should be reversed as to all respondents and the case should be remanded for a full trial. Any other result will open persons in lawful authority to a powerful temptation to involve the national guard precipitously in civil police functions, to negate thereby enforcement of constitutional protection under §1983.

Respectfully submitted,

MARIO G. OBLEDO,
VILMA S. MARTINEZ,
SANFORD JAY ROSEN,
Mexican American Legal Defense
and Educational Fund,
145 Ninth Street,
San Francisco, California 94103,
NICHOLAS WARANOFF,
675 Sharon Park Drive,
Menlo Park, California 94025,
Attorneys for Amicus Curiae.

October, 1973.

Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-914

SARAH SCHEUER, Administratrix of The Estate of Sandra Lee Scheuer, Deceased,

Petitioner,

—v.—

JAMES RHODES, SYLVESTER DEL CORSO, ROBERT CANTERBURY, HARRY D. JONES, JOHN E. MARTIN, RAYMOND J. SRP, VARIOUS OFFICERS AND ENLISTED MEN AND ROBERT WHITE,

Respondents.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF PETITIONER ON THE MERITS

MICHAEL E. GELTNER
LEONARD J. SCHWARTZ
American Civil Liberties Union of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union Foundation, Inc.
22 East 40th Street
New York, New York 10016

NELSON G. KARL
33 Public Square
Suite 210
Cleveland, Ohio 44113

Attorneys for Petitioner

Of Counsel:

STANLEY K. LAUGHLIN
NIKI Z. SCHWARTZ
MICHAEL S. HARSHMAN
American Civil Liberties Union of Ohio Foundation
203 East Broad Street
Columbus, Ohio 43215

WALTER S. HAFFNER
1008 Standard Building
Cleveland, Ohio 44113